IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978

Case No. 79-12

UNITED STATES OF AMERICA,

Respondent

vs.

EDWARD PERRY REDDECK,

Petitioner

PETITION FOR A WRIT OF CERTIORARI

Appeal from the United States District Court
for the Central District of California

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TOPICAL INDEX

TABLE OF AUTHORITIES

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APPEAL FROM
UNITED STATES DISTRICT COURT OF APPEALS
NINTH CIRCUIT

The petitioner, EDWARD PERRY REDDECK, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 31, 1979.

OPINION BELOW

The opinion of the Court of Appeals appears in Appendix A hereto. No opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on January 31, 1979. A timely petition for rehearing en banc was denied on April 9, 1979. Mandate was issued by the United States Court of Appeals on April 16, 1979, and this Petition for Certiorari was filed subsequent to 30 days of that date. A Motion for Recall and Stay of Mandate was denied on June 6, 1979 by the Court of Appeals for the Ninth Circuit. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Code of Federal Regulations §233.2, Mail Covers, violates the Constitutional protections of the Fourth Amendment.

2. Whether a trial court should be required to comply with the provisions of Federal Rules of Criminal Procedure Rule 11 when accepting a stipulation which constitutes a de facto plea of guilty.

STATUTORY PROVISIONS INVOLVED

Code of Federal Regulations, Title 39 §233.2, Mail Covers. Federal Rules of Criminal Procedures, Rule 11.

STATEMENT OF THE CASE

Petitioner was charged by indictment in the Eastern District of Texas, Tyler Division, with nine counts of violations of 18 U.S.C. §1431, pertaining to mail fraud. Said indictment was filed on January 15, 1976. Based upon petitioner's Motion to Transfer filed pursuant to Federal Rules of Civil Procedure Rule 21(a), said action was transferred to the Southern District of California on March 21, 1977 and was subsequently transferred to the Central District of California.

The indictment was based upon the results of a Mail Cover requested by Postal Inspector Ingersol and authorized by the responsible Postal Inspector at Ft. Worth, Texas on June 16, 1975. The Mail Cover was requested for all first class mail received by the Post Office for delivery to EDWARD P. REDDECK, Success Institute, Church of Universal Education and Dallas State College, Rural Route 7, Box 251, Tyler, Texas 75701. Although the mail cover was specifically limited to petitioner REDDECK and three entities, information was provided by the Postal Inspector from envelopes mailed to American International Advertising Agency, Success, Degrees, College Degrees, American International University, American Educational Consultants, Jim Edwards, Edward Stewart, Mary Stewart International, and California Christian University. The Mail Cover was requested for a period of 15 days. Information from mail sent from the law firm of Loftis, Rowan and Files to petitioner and from petitioner's church, The World-Wide Church of God, was also

recorded pursuant to said mail cover. Petitioner was never apprised of the existence of the mail cover by any authority.

The stated purpose of the postal service investigation was to determine whether petitioner had violated Title 18 U.S.C. §1341, Mail Fraud. The mail cover was assertedly requested to determine the identity of possible victims of petitioner's "scheme." Petitioner placed advertisements in national publications offering free details on how to obtain college degrees by mail. Petitioner advised those responding to his advertisements how to obtain college degrees from institutions, some accredited institutions among them, based upon a person's life experiences. Petitioner offered for sale books entitled "How to Obtain a Degree from U.S. Colleges" and "How to Obtain a Degree from British Schools." Petitioner also made available to inquirers a personalized degree program.

Petitioner repeatedly stated to the trial court that he had no intent to defraud anyone nor receive monies for services which he could not provide. In fact, petitioner received less than a total sum of $250.00 for the actions upon which his five-year conviction is based.

After a hearing on a Motion to Suppress Evidence, petitioner entered into a Stipulation as to the facts supporting Count I of the Indictment. Petitioner was subsequently sentenced to the maximum of five years imprisonment.

Petitioner properly and timely gave Notice of Appeal to the United States Court of Appeals for the Ninth Circuit and was subsequently released from custody after posting a personal recognizance bond.

REASONS FOR GRANTING WRIT

(1) The Mail Cover Statutes violate the Constitutional Protections of the Fourth Amendment.

Code of Federal Regulations §233.2 (2) (i), Mail Covers, provides in relevant part that the Chief Postal Inspector or his designee, may order mail covers under the following circumstances:

> "When he has reason to believe the subject or subjects of the mail cover are engaged in any activity violative of any postal statute. . . "
>
> Postal Service, 39 C.F.R. §233.2 (1978)

Viewed from the parameters of the protections of the Fourth Amendment, even though a practice is authorized specifically by statute, if it purports to authorize a warrantless search, the constitutionality of the actual search is considered in terms of the protections of the Fourth Amendment. **Sibron v. New York**, 392 U.S. 40, 59-62 (1968). Although the mail cover statute specifically states, "(t)he U.S. Postal Service maintains rigid controls and supervision with respect to the use of mail covers as investigative or law enforcement techniques," the standards and controls used for qualification and initiation of the mail cover are at best minimal. The Postal Inspector ordering the mail cover has only to state he has **reason** to believe that the subject of the mail cover is involved in some activity violative of a postal statute. However, the subject of the mail cover is not advised by the postal authorities that the mail cover is actually in effect. Section 233.2(g) (3) provides that if the Chief Postal Inspector, or his

designee, determines that a mail cover was improperly orderd, then all data acquired while the cover was in existence shall be destroyed and the requesting authority notified of the discontinuance of the mail cover and the reasons therefor. However, there is no recourse available to the subject of the mail cover under the statute since no notice is given to him that the cover is in effect.

Unlike an application for a search warrant, a request for a mail cover is wholly independent from any type of judicial review. One government agency rarely makes a request to another government agency without the review of any other independent body. The application of this Court's decision in **Katz v. United States**, 389 U.S. 347 (1967), would seem to lend support to a finding that the mail cover statute is in fact in violation of the Fourth Amendment. **Katz** and its successor cases have concluded that "the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." 389 U.S. at 353. Although several of the Circuits have decided cases dealing with the mail cover statute and have upheld the constitutionality of said statute, none have been decided other than in the Ninth Circuit in **United States v. Choate**, 576 F.2d 165 (9th Cir. 1978) and the Second Circuit, **United States v. Leonard**, 524 F.2d 1076 (2d Cir. 1975) in terms of the Fourth Amendment. The **Leonard** court found that the mail cover was not an unreasonable search in violation of the Fourth Amendment using the reasoning that there was no reasonable expectation of privacy with

respect to information on the covers of international mail. **'id.** at 1087. However, this Court has not yet considered the constitutionality of the mail cover in light of **Katz**.

This Court indicated in **Katz** that "What [a person] seeks to preserve is private, even in an area accessible to the public, may be constitutionally protected" from warrantless searches by the government. 389 U.S. at 351-52. It would appear that the privacy so jealously protected by the Fourth Amendment is linked to the liberty interests which preclude governmental interference with highly personal decisions, such as to whom mail is sent and received, and to the right to keep personal effects to one's self. Within the ambit of the instant factual situation, the petitioner had no choice in the use of the methods by which to conduct a mail order business. The postal service has, in essence, the only practical method of bulk mail delivery. Petitioner, as well as most individuals, utilized the postal service with the assumption that government authorities would not interfere in any way nor concern themselves in any way with to whom and from whom the mail was transmitted. In fact, the petitioner had no other real choice other than to use the postal service as a means by which to receive his mail. As stated in the **United States v. Ortiz**, 422 U.S. 891, 895 (1975), "the central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials." It would appear that especially in a situation where an individual has no real choice other than to use the postal service as a vehicle for its

mail, that that citizen may reasonably expect that his affairs will be free from intrusive governmental scrutiny.

So as to perform the mail cover requested in the instant case, a postal employee was required to search through and segregate all mail being sent to find that posted to the subject addresses. Then the covers of mail were scrutinized to record the requested categories of information. Unquestionably this was a search of petitioner's mail and a seizure of the information on its covers. If the mail cover had not been requested, the information on each piece of mail would have been noticed only momentarily, if at all, and then only to effectuate proper delivery. In addition, the government compiled the information recorded from the cover thus recording it in a way it was never intended to be compiled and recorded. Since one has no choice but to utilize the postal service in mailing items, there is an intrinsic expectation that government agencies will not open or record information regarding mail.

Petitioner submits that the instant mail cover was neither prompted by an emergency or exigent circumstances so that the intent of the Postal Service in accomplishing the cover would have been frustrated by requiring a review by a magistrate or similar court officer. In the instant case, a mail cover was to have lasted only for a period of 15 days and it did not appear that any particular 15 day span was distinguished or significant. It would not appear unreasonable to require the government to make a showing of probable cause to attain the results of a mail cover. The utilization of the

Postal Service investigative powers should not be any different that that of another arm of the government. In the event that a law enforcement agency feels it has reasonable grounds to believe that an activity is violative of the postal statute, then it would seem reasonable to expect that agency to be able to establish probable cause for what will be required. In the instant case, it would appear also that the scope of the search was unreasonable in that it clearly included matter mailed to petitioner's attorney. Section 233.2(f) states, "[n]o mail covers shall include matter mailed between the mail cover subject and his known attorney at law." Although the mail cover listed one name as petitioner's attorney, a letter was included in the mail cover which was addressed to the sender as "Loftis, Rowan, and Files, Attorneys at Law." Quite obviously, this was mail between petitioner and his attorney.

Thus, the correctness of the decision below, is open to serious question in light of the established protections of the Fourth Amendment. The decision raises significant and recurring problems concerning constitutionality of the mail cover statute in light of the application of the Fourth Amendment protections.

(2) A trial court should be required to comply with the provisions of the Federal Rules of Criminal Procedure Rule 11 when accepting a Stipulation which constitutes a de facto plea of guilty.

Federal Rule of Criminal Procedure Rule 11(c) provides as follows:

"ADVICE TO DEFENDANT

"Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

"(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

"(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

"(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine the witness against him, and the right not to be compelled to incriminate himself; and,

"(4) that if he pleads guilty or nolo contendere, there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

"(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he had pleaded, and if he answers these questions under oath, on the record, and in the presence of his counsel, his answers may later be used against him in a prosecution for perjury or false statement."

Federal Rule of Criminal Procedure Rule 11 (d) provides as follows:

"INSURING THAT THE PLEA IS VOLUNTARY

"The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney."

Federal Rule of Criminal Procedure Rule 11(f) provides as follows:

"DETERMINING ACCURACY OF PLEA

"Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea"

In the case at bar, the petitioner's agreement to allow the government to proceed on a set of stipulated facts, said stipulation containing all of the elements of Count I of the criminal indictment, was tantamount to his entering a plea of guilty. As the court stated in the **United States v. Terrack** 515 F.2d 558 (9th Cir. 1975):

THE COURT: ". . . (you) are entitled to insist that the Government prove their case beyond a reasonable doubt. By signing the stipulation agreeing to it, you are virtually stipulating to the facts which indicate your guilt. Do you understand that?

THE DEFENDANT: "Yes Sir, I do.

THE COURT:: "And that for all intents and purposes this is a guilty plea except for the fact that you are doing it in this manner in order to reserve the rights or your position which you asserted on the motion for dismissal?

THE DEFENDANT: "Yes Sir, I do.

THE COURT: "And with that knowledge you are then waiving those rights and agreeing that this stipulation may be signed?

THE DEFENDANT: "Yes Sir, I did.

THE COURT: "Very well. The stipulation will be received." (**Id.** at 560 n.2)

That the 9th Circuit found that in the **Terrack** situation that a Rule 11 examination was inapplicable and that the examination of the defendant was sufficient, points to a significant and recurring problem which arises in stipulations accepted by trial courts which are tantamount to a guilty plea. As in the Terrack court, some courts undertake an examination of the defendant comparable to the provisions of Rule 11. However, this is not mandated upon the trial courts and the trial courts have not uniformly conducted such examinations. In the instant case the trial court did not advise petitioner that the stipulation submitted was for all intents and purposes a guilty plea but instead stated that it would base its determination of petitioner's guilt or innocence upon the stipulation. In cases holding that Rule 11 advisements were unnecessary upon the submission of the stipulation, the decisions reveal some indication to the trial court that the defendant was

aware of the constitutional rights he was waiving by his actions or at the very least, an advisement that the stipulation constituted a "de facto plea of guilty." In the case at bar, the only inquiry by the trial court to petitioner subsequent to the presentation of the stipulation was questioning by the court regarding petitioner's right to a trial by jury, waiver of that right, together with a waiver of special findings of fact by the court, and an inquiry concerning whether or not petitioner had advised with his attorneys before signing the document. The court did not inquire as to whether or not the petitioner was aware of the maximum sentence that might be imposed upon him nor whether or not he was aware of his right to confront witnesses, cross-examine them or his right to remain silent. A trial court can hardly assume that a defendant will be informed of these rights and the consequences of waiving them.

It would appear that in situations where a trial court is accepting a stipulation, that it should have a duty placed upon it to disclose to a defendant, when applicable, that the stipulation is tantamount to a guilty plea and as in conjunction with the entry of a guilty plea the defendant should be made aware of all of the accompanying advisements.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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PHILLIP STEIN
CARL E. STEWART

Attorneys for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EDWARD PERRY REDDECK,
Defendant-Appellant.

MEMORANDUM
NO. 77-3582

Appeal from the United States District Court
for the Central District of California

Before: WALLACE, ANDERSON, Circuit Judges and INGRAM,* District Judge

Edward Perry Reddeck appeals from the order of the District Court denying his motion to suppress evidence which he asserts was the product of an improperly conducted and unconstitutional mail cover, and from his conviction after trial upon stipulated facts claiming that his entry into the stipulation was not a

knowing and intelligent one, and that the trial judge improperly failed to comply with the provisions of Rule 11, Fed. R. Crim. P., inasmuch as the stipulation in question was tantamount to a guilty plea.

We affirm.

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*Honorable William A. Ingram, United States District Judge for the Northern District of California, sitting by designation.

Appellant was originally indicted in the District Court for the Western District of Texas. Upon motion under Rule 21, Fed. R. Crim. P., the case was transferred successively to the Southern and Central Districts of California.

The indictment, alleging nine counts of mail fraud in violation of 18 U.S.C. §1341 is factually predicated upon Reddeck's offering to sell college degrees by mail.

In the course of their investigation of appellant's conduct, postal inspectors requested the Postmaster of Tyler, Texas, (Appellant's then place of residence) to conduct a fifteen day mail cover on mail addressed to appellant, Success Institute, Church of Universal Education and Dallas State College at Rural Route 7, Box 251, Tyler, Texas 75701. Appellant contends that the Postmaster exceeded the scope of the mail cover request by recording identities and information of all mail directed to the address in question, without regard to the name of the specific addressee. He also contends that departmental mail cover regulations were violated because his mail was delayed in delivery, correspondence from his attorney was noted and that some of his mail was improperly opened by postal authorities. Additionally, he attacks the constitutionality of the mail cover regulation itself on the basis that it is violative of the First and Fourth Amendments.

Appellant further contends that the trial court erred by proceeding with imposition of judgment, because appellant had not knowingly, freely and voluntarily entered into the stipulation of facts upon which the case was tried. This contention essentially rests upon the notion that under the circumstances here present, the stipulation entered into by appellant was the equivalent of a guilty plea, thus requiring the trial judge to conduct the interrogation contemplated by the provisions of Rule 11, Fed. R. Crim. P.

We disagree with each of the contentions so advanced.

The constitutionality of the mail cover regulation has been considered previously by this court and has been upheld. **United States v. Choate**, 576 F.2d 165 (9th Cir. 1978), **cert. denied**, 58 L.Ed.2d 344. The assertions that the mail was delayed in delivery and was improperly opened were factually controverted at the hearing of the motion to suppress evidence, and the trial court's determination upon the showing made will not be disturbed by us. The evidence at that hearing did reveal that addressees other than those expressly named in the mail cover request were noted and recorded. However, the judgment from which this appeal is taken relates to count one of the indictment only, and the addressee therein named, C. H. Hsieh,

initially addressed a communication to "Success", an addressee substantially within the therms of the mail cover request. (See CT 11, 62, 110, 137.)

Appellant raises further issues with respect to the mail cover, i.e. late delivery and listing of the name of an attorney. In light of the testimony elicited at the hearing of the motion to suppress evidence, we find these contentions to be without merit.

Appellant contends further that his entry into an agreed statement of facts, and that the case be tried upon those facts was tantamount in the circumstances to a plea of guilty. He contends that following his conviction he communicated to the trial court his belief that he had defrauded no one, although he had previously stipulated that he did ". . . devise and intend to devise a scheme and artifice to defraud. . . ." He avers that the trial court made no independent inquiry into the factual aspects of the case to determine whether the stipulation made by appellant was factually supportable and made an adequate inquiry into the voluntariness of the trial upon stipulated facts. In short, appellant contends that his agreement was the same as a guilty plea, particularly since the court did not advise him of the certainty of his conviction under the facts to which he had agreed, and that the court should have complied with the requirements of Fed. R. Crim. P. 11 before permitting the entry of a judgment of conviction after trial upon stipulated facts.

These contentions are without merit. This court has repeatedly held that the filing of a stipulation which constitutes an admission of guilt does not require compliance with Rule 11. Cf. **United States v. Garcia,**

450 F.2d 287 (9th Cir. 1971); **United States v. Terrack,** 515 F.2d 558 (9th Cir. 1975); **United States v. Nixon,** 545 F.2d 1190 (9th Cir. 1976).

In **Terrack** the court observed:

> "To require a Rule 11 examination on every stipulation containing a vital admission of the defendant would add ritualistic formalities where none are needed or required. Here, appellant and his trial counsel were following the usual procedure to preserve the right to appeal the speedy trial question. If Rule 11 were to be applied only to stipulations constituting de facto pleas of guilty, when and how is that determination made? Every stipulation of a vital fact is an admission tending to establish guilt. Rule 11 specifically applies to please of guilty and **nolo contendere** and not to trials. These are areas with a clear division between them. They are either black or white. To create a gray area where stipulations, as a part of a trial, would be governed by the rules on the acceptance of pleas would further complicate the trial judge's duties and push him further into the role of an advocate." 515 F.2d at 566, n.3.

Here, the stipulation was the result of a plea bargain by which appellant achieved dismissal of eight counts of the indictment filed against him and preserved his right to appeal the order denying his motion to suppress evidence. The court inquired as to whether the defendant had any objections to the introduction of plaintiff's evidence, and one objection was stated. (RT, 106.) The court inquired as to whether appellant wished to offer any evidence and counsel

requested that judicial notice be taken of a California statute which request was granted by the court. (RT, 107.) In response to the court's further inquiry defense counsel declined to present further evidence. (RT, 107.) It is patent from the record that the appellant was not foreclosed, either by the terms of the stipulation or by the court from introducing whatever evidence he desired. He had every opportunity to testify or to offer whatever evidence he wished. These facts do not disclose any abuse on the part of the trial court, and well illustrate the "clear division" between guilty pleas and trials referred to in **Terrack**.

We find appellant's efforts to distinguish **Terrack** and **Nixon, supra**, unpersuasive. The colloquy at pages 102-105 of the reporter's transcript dealing with the waiver of trial by jury, advice with counsel and desire to proceed upon stipulated facts indicate a more than adequate solicitude by the court for the rights of the defendant in these circumstances.

The judgment is affirmed.

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs.

EDWARD PERRY REDDECK,

Defendant-Appellant

ORDER
No. 77-3582

Before: WALLACE and ANDERSON, Circuit Judges, and INGRAM,* District Judge

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*Honorable William A. Ingram, United States District Judge, Northern District of California, sitting by designation.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1509 N. Main Street, Santa Ana, California 92701.

On June 30, 1979, I served the within PETITION FOR A WRIT OF CERTIORARI on the interested parties in said action by placing a true copy in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

WADE H. MC CREE
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on June 30, 1979, at Santa Ana, California.

JACK GALLAGHER